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Military Law -- Illegality of Orders

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authority from the mortgagee to the mortgagor to subject the automobile to a mechanic's lien for all necessary and reasonable repairs. In the principal case, the court did not mention the point that the repairs must be necessary and reasonable, but if they were not, the priority of the lien over the mortgage might be disallowed for this reason.¹⁹

JEAN M. LUCK

Military Law—Illegality of Orders

Under the Uniform Code of Military Justice disobedience of an order is punishable only if the order is legal.¹ Illegality, whenever found, voids the order.² This Note is intended to illustrate some of the controversies that have arisen in this area.

Disobedience of an order which is palpably illegal on its face, such as an order to commit murder or larceny, would not subject one to punishment.³ Indeed, compliance with a palpably illegal order cannot usually be justified; and in a trial by court-martial or a suit in damages for an act done in obedience, the order will be admissible only in mitigation of the offense.⁴ However, an order not palpably illegal on its face is usually presumed to be legal, and the risk of disobedience is the personal responsibility of the recipient of the order.⁵

¹⁹ This question has received considerable attention in Indiana. See *Campa v. Consolidated Finance Corp.*, 231 Ind. 580, 110 N.E.2d 289 (1953) (could not show necessity of repairs so as to raise implied consent of conditional sales vendor, vendor won over repairman); *Personal Finance Co. v. Fecknoe*, 216 Ind. 330, 24 N.E.2d 694 (1940) (could not show necessity of repairs, mortgagee won over repairman); *Grusin v. Stutz Motor Car Co.*, 206 Ind. 296, 187 N.E. 382 (1933) (repairman won over mortgagee). In the latter case the court said, "The repairs for which the lien will be enforced must be necessary and add to the value of the property; . . . unless they are clearly beyond this requirement . . ." the mechanic's lien will prevail. *Id.* at 302, 187 N.E. at 384.

¹ Article 90, Uniform Code of Military Justice, 10 U.S.C. § 890 (Supp. IV, 1957).

"Any person subject to this code who—

"(2) willfully disobeys a lawful command of his superior commissioned officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct."

Article 91, Uniform Code of Military Justice, 10 U.S.C. § 891 (Supp. IV, 1957), provides that any warrant officer or enlisted person who willfully disobeys the lawful order of one senior to him shall be punished as a court-martial may direct.

Article 92, Uniform Code of Military Justice, 10 U.S.C. § 892 (Supp. IV, 1957), provides that any person subject to the Code who violates or fails to obey any lawful general order or regulation shall be punished as a court-martial may direct.

² AVINS, *THE LAW OF AWOL* 207 (1957).

³ 1 WINTHROP, *MILITARY LAW AND PRECEDENTS* 575 (2d ed. 1920).

⁴ *Beckwith v. Bean*, 98 U.S. (8 Otto) 266 (1878); *Bates v. Clark*, 95 U.S. (5 Otto) 204 (1877); *United States v. Kinder* 14 C.M.R. 742 (1954); *State v. Sparks*, 27 Tex. 627 (1864).

⁵ *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, 1951, para. 169b. See *United States v. Rosato*, 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953); *United States v. Trani*, 1 U.S.C.M.A. 293, 3 C.M.R. 27 (1952); *United States v. Reese*, 7 C.M.R. 292 (1953).

In the recent case of *United States v. Milldebrandt*⁶ the Court of Military Appeals was confronted with the problem of legality of orders under article 90 of the Uniform Code.⁷ In this case an enlisted man was granted a leave in order to permit him to obtain civilian employment and to clear up personal financial problems. The leave was conditioned upon his making weekly progress reports of his financial condition to the officer who authorized the leave. Upon failure to submit the ordered reports, the leave was revoked. When he returned to his station he was charged with willful disobedience of the order. The court held this order to be illegal on the ground that it was too broad. The court pointed out that under such an order a person might be prosecuted for failure to disclose information of a confidential or incriminating nature. Such orders, said the court, must be specific, definite, and certain as to the information to be supplied so that they can be measured for illegality. Otherwise, the only penalty that may be imposed for disobedience is revocation of the leave.

A second question presented in the *Milldebrandt* case was whether such an order had to be complied with during a period of authorized leave. This question was before the court as a matter of first impression. Judge Latimer concluded that when an enlisted man is on leave, he should not be subject to orders requiring him to perform strictly military duties unless such performance is compelled by the presence of some grave danger or unusual circumstance. Judge Ferguson and Chief Judge Quinn concurred only in the result, the former without opinion. The Chief Judge stated, without discussion, that he had serious doubts about the validity of the implications of the opinion as to military personnel on leave.⁸ As the case could have been decided on the first point and two judges concurred in the result only, the decision is not clear-cut as to military jurisdiction over personnel on authorized leave.

An order given solely for the purpose of inflicting unauthorized punishment is illegal. Article 15 of the Uniform Code of Military Justice⁹ is the only authority for imposing punishment without a trial. Frequently it is contended that certain orders are an attempt to inflict punishment without giving the recipient the benefits of article 15. It is clear that a valid order to perform training can be given without proceeding under this article. The difficulty arises in determining whether an order is for the purpose of inflicting punishment or for training purposes.

⁶ 8 U.S.C.M.A. 635, 25 C.M.R. 139 (1958).

⁷ 10 U.S.C. § 890 (Supp. IV, 1957). See note 1 *supra*.

⁸ 8 U.S.C.M.A. at 639, 25 C.M.R. at —.

⁹ 10 U.S.C. § 815 (Supp. IV, 1957) (Formerly 64 STAT. 112 (1950), 50 U.S.C. § 571 (1952)).

In *United States v. Trani*¹⁰ a prisoner was ordered to perform close order drill during normal duty hours until he "shaped up and got a little better discipline [and] better control of himself."¹¹ The Court of Military Appeals was not convinced that the ordered drill was for punishment purposes. The court said it did not wish to substitute its judgment for that reasonably exercised by an officer in command of personnel. However, the court pointed out that it would not hesitate to declare unlawful the punitive use of close order drill or any other military duty.

The result was different in *United States v. Roadcloud*,¹² where a prisoner was ordered to drill at 10:30 p.m. because he had been disobedient and uncooperative. This drill was conducted when other prisoners were not at work. The order was held to be punitive and unlawful as there did not appear to be any fair and reasonable relationship between the drill and rectification of any of the accused's deficiencies.

In *United States v. Reeves*¹³ an enlisted man was "gigged" at an inspection and placed on detail by his first sergeant. A noncommissioned officer in charge of the detail ordered him to mow the grass in the company area. The order was held illegal as being fatigue duty assigned as punishment and not classifiable as training or exercise. It was also pointed out that only officers are authorized to administer company punishment. Illegality has also been found in an order to clean the barracks at 4:00 p.m. on Saturday,¹⁴ an order to take a parachute from room to room and put it down in the proper manner announcing to all present that this was the proper method of handling it,¹⁵ and an order for a one-day absentee to spend the night of his return in a guarded cell.¹⁶

As the foregoing cases indicate, it is often difficult to determine when punishment is being inflicted. Changing a "K.P." or duty roster in order to put a special burden on a man who has previously been in trouble, or giving a reprimand because of acts which are a clear violation of the Uniform Code would look suspiciously like punishment. But what if the commanding officer directs that these persons practice close order drill during the week-end and claims that this special duty is imposed only to improve their efficiency?¹⁷ The company commander clearly has the authority to assign special training to improve efficiency.

¹⁰ 1 U.S.C.M.A. 293, 3 C.M.R. 27 (1952).

¹¹ *Id.* at 295, 3 C.M.R. at 27.

¹² 6 C.M.R. 384 (1952).

¹³ 1 C.M.R. 619 (1951).

¹⁴ *United States v. Robertson*, 17 C.M.R. 684 (1954).

¹⁵ *United States v. Raneri*, 22 C.M.R. 694 (1956).

¹⁶ *United States v. McCarthy*, 23 C.M.R. 561 (1957).

¹⁷ EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 135 (1956).

By taking this position, he has made difficult the burden of proving illegality.

The question of whether or not an order is legal that requires a serviceman to give evidence against himself has been very confusing. The question must be determined under article 31(a) of the Uniform Code of Military Justice,¹⁸ which provides that no person subject to the Code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him. In *United States v. Eggers*¹⁹ the court observed that Congress intended to secure to persons subject to the Code the same rights against self-incrimination secured to civilians under the fifth amendment.

Paragraph 150b of the *Manual for Courts-Martial* interprets the prohibition of article 31(a) of the Code as being limited to compulsion in obtaining verbal or other communications in which an individual expresses his knowledge of the matter. According to this paragraph a person may lawfully be ordered to try on clothing or shoes, to place his feet in tracks, to make a sample of his handwriting, to utter words for the purpose of voice identification, to submit to fingerprinting or bloodtesting, or to expose his body for examination by the court or by a physician who will testify to the result of his examination. However, the court has disapproved some of these *Manual* provisions as being in conflict with article 31(a). Thus, orders requiring a person to read for voice,²⁰ to give a sample of his handwriting,²¹ to print the alphabet,²² and to submit to a blood alcohol test²³ have been held illegal.

The Armed Services have been plagued with narcotics cases, several of which involve the legality of an order to the narcotic suspect to furnish a urine sample and the subsequent use thereof as evidence against him. In *United States v. Williamson*²⁴ the court concluded that a urine specimen obtained from the body of an unconscious suspect by means of a catheter was admissible as evidence. In *United States v. Booker*²⁵ it was held that a urine specimen obtained from a suspect with his consent and full cooperation is admissible even though the suspect had not been informed of the nature of the accusation and had not been advised that he need not give the specimen. In *United States*

¹⁸ 10 U.S.C. § 831 (Supp. IV, 1957) (Formerly 64 STAT. 118 (1950), 50 U.S.C. § 602 (1952)).

¹⁹ 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953).

²⁰ *United States v. Greer*, 3 U.S.C.M.A. 576, 13 C.M.R. 132 (1953).

²¹ *United States v. Eggers*, 3 U.S.C.M.A. 191, 11 C.M.R. 191 (1953).

²² *United States v. Rosato*, 3 U.S.C.M.A. 143, 11 C.M.R. 143 (1953).

²³ *United States v. Musquire*, 23 C.M.R. 571 (1957); *aff'd*, 9 U.S.C.M.A. 67, 25 C.M.R. 329 (1958).

²⁴ 4 U.S.C.M.A. 320, 15 C.M.R. 320 (1954).

²⁵ 4 U.S.C.M.A. 335, 15 C.M.R. 335 (1954). See also *United States v. Barnaby*, 5 U.S.C.M.A. 63, 17 C.M.R. 63 (1954).

v. Jones,²⁶ the specimen was held inadmissible because the sample was taken by catheterization over the protest of the suspect after he had tried but failed to comply with the order to furnish the urine sample.

After this decision the Services apparently felt that a direct order to furnish a urine sample as evidence was illegal. They began following a suggestion that, instead of an order to furnish a sample, the suspect should be given an explicit order that, when next he urinates, he should do so in a certain container.²⁷ This method was declared illegal in *United States v. Jordan*.²⁸ Thus it seems that all orders which require a person to furnish a urine sample that will be used as evidence against him are now illegal.

In *United States v. Bayhand*²⁹ an order to the unsentenced prisoner to stand in a muddy ditch and carry rocks with sentenced prisoners was held to be illegal. The court, citing article 13 of the Uniform Code of Military Justice,³⁰ said a distinction must be made between unsentenced and sentenced prisoners with respect to their treatment. The holding, said the court, does not mean that unsentenced prisoners must remain unemployed. They can be required to perform certain useful military duties.³¹

In *United States v. Zachery*³² a six foot man disobeyed an order to return to a six by six segregation cell after being permitted to leave it temporarily. It was contended that this order was illegal under article 55 of the Uniform Code of Military Justice,³³ which prohibits punishments of a cruel or unusual nature. The court held that the cell was not so small as to make confinement therein a violation of the article.

An order may also be unlawful because it does not relate to a military duty. Orders which properly maintain discipline and insure efficient discharge of the military mission are legal even though the prohibited

²⁶ 5 U.S.C.M.A. 537, 18 C.M.R. 161 (1955). See also, *United States v. Speight*, 5 U.S.C.M.A. 668, 18 C.M.R. 292 (1955).

²⁷ This suggestion was made particularly by Robinson O. Everett, former Commissioner, United States Court of Military Appeals. See his book, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* 83 (1956).

²⁸ 7 U.S.C.M.A. 452, 22 C.M.R. 242 (1957).

²⁹ 6 U.S.C.M.A. 762, 21 C.M.R. 84 (1956).

³⁰ 10 U.S.C. § 813 (Supp. IV, 1957) (Formerly 64 STAT. 112 (1950), 50 U.S.C. 567 (1952)).

"Subject to section 857 of this title (article 57), no person while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline."

³¹ See also *United States v. Hammond*, 21 C.M.R. 422 (1956).

³² 6 C.M.R. 833 (1952).

³³ 10 U.S.C. § 855 (Supp. IV, 1957) (Formerly 64 STAT. 126 (1950), 50 U.S.C. 636 (1952)).

conduct is not criminal per se nor forbidden by law.³⁴ But an order which has as its sole objective the attainment of some private end,³⁵ or the sole purpose of increasing the penalty for an offense which it is expected the accused may commit,³⁶ is not lawful.³⁷

The order to be lawful must also be one which the superior officer is authorized under the circumstances to give. This point has come up in connection with orders that one expend his personal funds. In *United States v. Gordon*³⁸ it was held that a commanding officer had no right to demand that an enlisted man expend his personal funds in moving his personal belongings from his off post living quarters back to the post. However, it was noted that an order to have a dirty uniform cleaned, to get a needed haircut, and orders of a like nature would be legal even though obedience required expenditure of personal funds, provided compliance did not depend on financial status. Orders tending to discourage black market activities have been held to be legal even though they involve limitations on the use of private property of a serviceman.³⁹

An order is not authorized when the one to whom it has been given is excused from such duty,⁴⁰ or when such order is inconsistent with an order previously given by a superior authority.⁴¹

It remains to be pointed out that even though the serviceman feels that he is justified in refusing to obey an order, he should remember that he is generally at a very considerable disadvantage. The presumption generally will be in favor of the legality of the order and the reasons upon which legality may hinge will often rest only in the possession

³⁴ *United States v. Hill*, 5 C.M.R. 665 (1952); *United States v. Wilson*, 4 C.M.R. 311 (1952).

³⁵ 10 U.S.C. § 3639, 8639 (Supp. IV, 1957) (Formerly REV. STAT. § 1232 (1875), 10 U.S.C. § 608 (1953)). It is provided that no officer may use an enlisted man as a servant.

United States v. Robinson, 6 U.S.C.M.A. 347, 20 C.M.R. 63 (1955), held that Special Regulations 210-60-1, 7 December 1948, which permitted the use of enlisted men in the officers' mess on a voluntary basis was not in conflict. The court said that "servant" means one who labors or exerts himself for the personal benefit of an officer. It was held here to be a benefit to the service rather than a benefit to an officer personally. Judge Brossman, dissenting in this case, pointed out that the enlisted man did not volunteer since he was offered the choice between service in the officers' mess or being transferred to another and undisclosed military station.

³⁶ *United States v. Stock*, 2 C.M.R. 494 (1952). Here it was held unlawful to give an enlisted man an order to go on "K.P." after the enlisted man had stated to the officer giving the command that he would not go. *But see United States v. Buttrick*, 18 C.M.R. 622 (1954), where an enlisted man had stated that he would not salute an officer, because of his religious beliefs. An order to salute was held lawful on the ground that the officer giving the order reasonably believed that the enlisted man was attempting to bluff his way out of the impending overseas shipment.

³⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, para. 169b.

³⁸ 3 C.M.R. 603 (1952).

³⁹ *United States v. Martin*, 1 U.S.C.M.A. 674, 5 C.M.R. 102 (1952); *United States v. Barnes*, 12 C.M.R. 735 (1953).

⁴⁰ *United States v. Whitaker*, 5 C.M.R. 539 (1952).

⁴¹ *United States v. Voorhees*, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

of the superior who has given the order. It is usually safer and wiser for the inferior to obey the order even though it is to his own detriment. From the viewpoint of the Armed Services there could be no more dangerous philosophy than that each serviceman should determine for himself whether or not an order is legal, and then disobey it if, in his judgment, the order is illegal.

RICHARD J. TUGGLE

Practice and Procedure—Pre-trial in North Carolina—The First Eight Years

The information presented in this Note was obtained from the following sources: communication by mail with the clerks of the superior court in sixty-nine counties; communication by mail with the judge or recorder of twenty-one inferior courts possessing civil jurisdiction above that of a justice of the peace; interviews with the clerk of the superior court, a deputy or assistant clerk, or with a leading member of the bar in twenty-two counties; communication by mail with all members of the North Carolina Bar who submitted suggestions and criticism on pre-trial to the Bar Association Committee on Improving and Expediting the Administration of Justice; and communication by mail with nineteen superior court judges. All opinions and conclusions contained herein are a summary or digest of the ones gathered from these various sources.

The *General Statutes* require the clerk of the superior court to maintain a pre-trial docket.¹ Yet a survey of the actual practice in the various counties shows that, out of those contacted, fourteen maintain such a docket, nine others have one that is never used, and fifty-four do not even have a pre-trial docket. No information is available for the remaining twenty-three counties. At the same time, it is clear that

¹ N.C. GEN. STAT. §§ 1-169.1-.6 (1953). For a digest of these provisions, see *A Survey of Statutory Changes in North Carolina in 1949*, 27 N.C.L. REV. 405, 430-32 (1949). For comment on the early days of pre-trial in this state, see Paschal, *Pre-Trial in North Carolina: The First Eight Months*, 28 N.C.L. REV. 375 (1950). For a detailed bibliography of material on pre-trial, see INSTITUTE OF JUDICIAL ADMINISTRATION BULLETIN 2-U22, PRE-TRIAL RULES (Dec. 11, 1953). The most comprehensive general text available is NIMS, PRE-TRIAL (1950). For forms used in federal courts, see JOINER, TRIALS AND APPEALS 92 (1957). For demonstrations of the pre-trial conference, see 11 F.R.D. 3 (1952). For other material on pre-trial, including general discussions, forms, and demonstrations of the conference, see the following: Kincaid, *A Judge's Handbook of Pre-Trial Procedure*, 17 F.R.D. 437 (1955) (also prepared and distributed in pamphlet form under the auspices of the Pre-Trial Committee, Section of Judicial Administration, American Bar Association); Murrah, *Pre-Trial Procedure*, 14 F.R.D. 417 (1954); SUPREME COURT OF NEW JERSEY, MANUAL OF PRETRIAL PRACTICE (rev. ed. 1955); JUDICIAL COUNCIL OF CALIFORNIA, CALIFORNIA MANUAL OF PRE-TRIAL PROCEDURE (1956). A 16 mm. film entitled *A Pre-Trial Conference*, which demonstrates an actual conference, is available for a rental fee of \$4.75 plus postage from the National Legal Audio-Visual Center, Indiana University School of Law, Bloomington, Indiana.